

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| ASTRID E. SANCHEZ | : | DETERMINATION |
| | : | DTA NO. 821108 |
| for Redetermination of a Deficiency or for Refund of | : | |
| Personal Income Tax under Article 22 of the Tax Law | : | |
| for the Year 2003. | : | |

Petitioner, Astrid E. Sanchez, 34-35 76th Street, Apt. # 4D, Jackson Heights, New York 11372, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 2003.

A hearing was commenced before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on January 10, 2007 at 10:30 A.M., and continued to completion at 1740 Broadway, New York, New York, on April 19, 2007 at 1:15 P.M., which date began the six-month period for issuance of this determination. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (Kevin R. Law, Esq., of counsel).

ISSUE

Whether the child and dependent care credit of \$1,540.00 and the earned income credit of \$1,261.00 claimed by petitioner on her 2003 tax return were properly disallowed by the Division of Taxation on the basis that petitioner failed to provide sufficient documentation to substantiate that she was entitled to claim these two credits.

FINDINGS OF FACT

1. Petitioner herein, Astrid E. Sanchez, filed a timely New York State resident personal income tax return for 2003 whereon she claimed the filing status “head of household (with qualifying person).” Said return reported New York adjusted gross income of \$10,780.00, which amount consisted of business income of \$11,600.00 and an adjustment to income of \$820.00 for one-half of the social security tax. After subtracting the standard deduction of \$10,500.00 and two dependent exemptions of \$2,000.00 from reported income, there remained no taxable income and thus no New York State personal income tax liability. Petitioner’s return claimed a refund of \$2,864.00, which amount included a child and dependent care credit of \$1,540.00, an earned income credit of \$1,261.00 and a City of New York school tax credit of \$63.00.

2. Attached to petitioner’s return was a Federal Schedule C-EZ, Net Profit From Business, which reported that Ms. Sanchez was a sole proprietor engaged in the “maintenance” business. Federal Schedule C-EZ reported gross receipts of \$13,450.00, total expenses of \$1,850.00 and net profit of \$11,600.00. Petitioner’s return also included Form IT-215, Claim for Earned Income Credit, and Form IT-216, Claim for Child and Dependent Care Credit. Form IT-215 indicated that petitioner’s two children, an infant born during 2003 and a daughter aged 10, lived with her since the infant’s birth and for the entire tax year, respectively, that her business income for 2003 totaled \$10,780.00 (\$11,600.00 less \$820.00 for the adjustment to income for one-half of the social security tax), that the amount of her Federal earned income credit for 2003 was \$4,204.00 and that the New York State earned income credit was 30% of the Federal amount, i.e., \$1,261.00. Form IT-216 claimed that petitioner paid \$4,000.00 to Jose Benjamin Valencia during 2003 for child care services he provided for her two children, that the

Federal child and dependent care credit totaled \$1,400.00 and that the allowable New York State child and dependent care credit was equal to 110% of the Federal credit, or \$1,540.00.

3. On February 14, 2005, the Division of Taxation ("Division") issued a Statement of Tax Refund to petitioner reducing the refund claim on her 2003 tax return from \$2,864.00 to \$62.50. The Statement of Tax Refund contained the following explanation:

Our letter to you, dated 6/28/04, specifically asked that you provide the following verifiable information to document your earned income and any qualifying children claimed.

The information you provided for the items below was either incomplete or unverifiable:

Copies of business books/records for two month period.
Copy of your Federal tax return and supporting documentation.

Your claim for the earned income credit has been denied.

In order to be eligible for the child and dependent care credit, you must keep up a home. One or more qualifying persons must live in the home. You are considered keeping up a home if you pay from your own funds more than half of the cost of running it for the year. Costs of keeping up a home normally include property taxes, mortgage interest, rent, utility charges, home repairs, insurance for the home, and food eaten in the home. Payments you receive from public assistance benefits used to keep up your home are considered paid by the state, not by you. Also, money received from or paid by friends or relatives is not considered your own funds. After subtracting the child care expenses from your income, the remaining income is not sufficient to provide over half the cost of running your household from your funds. Based on the above requirements, no child and dependent care credit is allowed.

You have been allowed the City of New York School Tax Credit.

4. Petitioner submitted documentation to the Division and into the record of this matter in an attempt to establish that she paid more than one-half of the cost to maintain a household for herself and her two dependent children. Specifically, petitioner asserts that she received no public assistance in 2003 and that the cost of various household expenses, during the year 2003,

were as follows: gas/electric, \$1,200.00; rent, \$15,600.00; child care, \$4,000.00; and food, \$5,200.00.

During the year 2003, Jose Rodrigues, the father of petitioner's youngest daughter, paid for most of the household expenses. His wages were deposited into an account maintained by petitioner from which checks were written to pay for the expenses. The income earned by petitioner during the year at issue supplemented Mr. Rodrigues' income in paying for the household expenses and for dance and music lessons taken by her oldest daughter.

5. On April 1, 2005, the Division issued a Notice of Disallowance to petitioner wherein \$2,801.00 of the refund claimed on her 2003 tax return was disallowed. The amount disallowed represented the earned income credit of \$1,261.00 and the child and dependent care credit of \$1,540.00. The Notice of Disallowance indicated that the refund was denied because petitioner failed to provide sufficient documentation to establish that she had earned income during the year at issue.

6. Petitioner did not maintain any books or records, either formal or informal, detailing her activities as a housekeeper. The documents which petitioner submitted for review were clearly not contemporaneously kept records but instead represent documents which were produced solely for the purpose of substantiating the earned income credit and the child and dependent care credit as claimed on her 2003 tax return. In addition, petitioner had no records to establish any payments to Jose Benjamin Valencia for child care services.

CONCLUSIONS OF LAW

A. As applicable to this proceeding, Tax Law § 606(d) provides that the New York State earned income credit for the 2003 tax year is equal to 30% "of the earned income credit allowed under section thirty-two of the internal revenue code for the same taxable year. . . ." With respect

to the child and dependent care credit, Tax Law § 606(c) provides that the New York State credit is based on the Federal child and dependent care credit “allowable under section twenty-one of the internal revenue code.” Since the allowable New York earned income credit and child and dependent care credit are both determined based solely on the corresponding Federal credit, it is appropriate to refer to the provisions of the Internal Revenue Code, Treasury Regulations and Federal case law to determine petitioner’s eligibility for these two credits.

B. The Federal earned income credit, provided for pursuant to section 32 of the Internal Revenue Code, is a refundable tax credit for eligible low-income workers. The credit is computed based on a percentage of a taxpayer’s “earned income” which includes, *inter alia*, earnings from self-employment. The issue to be addressed with respect to the claimed earned income credit is whether petitioner has sustained her burden of proof (Tax Law § 689[e]) to show that she in fact generated \$13,450.00 of earned income as a self-employed housekeeper during the 2003 tax year.

The child and dependent care credit allowed pursuant to Internal Revenue Code § 21 is determined based on a percentage of employment related expenses, including expenses for the care of a qualified dependent under the age of 13, incurred by a taxpayer to be gainfully employed while maintaining a household which includes the qualified dependent. To maintain a household, the individual claiming the credit must furnish over one-half the household expenses. Internal Revenue Code § 21(c)(2) places a \$6,000.00 limitation on employment related expenses for two or more qualifying dependents and Internal Revenue Code § 21(d)(1)(A) further provides that employment related expenses cannot exceed a taxpayer’s earned income for the tax year. Earned income, for purposes of Internal Revenue Code § 21, includes earnings from self-employment (Treas Reg § 1.44A-2[b][2][ii]). Thus, to be entitled to claim the child and

dependent care credit, petitioner must substantiate the amount of employment related expenses that she paid in 2003, show that she had \$13,450.00 of earned income as a self-employed housekeeper and that she paid over one-half the cost of maintaining her household.

C. The evidence adduced in this matter is clearly insufficient to establish that petitioner generated \$13,450.00 of income as a self-employed housekeeper for the 2003 tax year. Petitioner maintained no books and records from which her income and expenses as a self-employed housekeeper could be determined, and there is no independent proof, such as forms W-2 or 1099, or other reliable evidence, to verify that she received \$13,450.00 of earned income in 2003.

In an effort to establish the amount of business income earned during the year 2003, petitioner submitted a notarized statement, dated July 7, 2004, to the Division in which she claimed that she was self-employed in maintenance, and that during 2003 she worked exclusively for Mr. Juan Manuel Sanchez and was paid \$13,450.00 for the year. The statement contained Mr. Sanchez' address, telephone number and social security number. A similar statement, dated January 15, 2007, was introduced into the record of this matter and bears the signature of Mr. Juan Manuel Sanchez. Petitioner indicated at the hearing that all payments from Mr. Sanchez were made in cash and that "maintenance" meant housekeeping. A second affidavit, dated March 20, 2006, was placed into evidence by petitioner which indicated that Ms. Anna Maria Rico had hired petitioner as a housekeeper and had paid her \$174.00 in cash per week for the year 2003.

The affidavit of Ms. Rico directly contradicts petitioner's and Mr. Sanchez' affidavits that petitioner was employed exclusively by Mr. Sanchez during 2003 and directly contradicts petitioner's tax return as to the amount of business income earned during the year at issue. These discrepancies bring into question both the amount of petitioner's business income earned during

2003 as well as the assertions contained in the affidavits themselves. Furthermore, the documents which were offered in evidence were not contemporaneous records, were undoubtedly produced solely to support petitioner's claimed credits and are to be accorded little or no weight.

D. Since the earned income credit is computed based on a percentage of a taxpayer's earned income and since the child and dependent care credit is limited to the amount of earned income, petitioner must establish the amount of her earned income in order to determine the allowable credits. In the instant matter, petitioner has failed to substantiate that she had any earned income in 2003, and therefore she is not entitled to claim either the earned income credit or the child and dependent care credit (*Blore v. Commr.*, 80 TCM 559).

E. With respect to the child and dependent care credit, petitioner, in addition to failing to prove she had earned income in 2003, has also failed to sustain her burden of proof to show that she paid employment related expenses or contributed more than one-half of the cost to maintain her household. It is noted that the father of petitioner's youngest daughter paid for most of the household expenses during 2003. Furthermore, petitioner was unable to produce any documentation to establish that she paid \$4,000.00 for child care services. Accordingly, the child and dependent care credit is also disallowed for these reasons.

F. The petition of Astrid E. Sanchez is denied and the Division's Notice of Disallowance dated April 1, 2005 is sustained.

DATED: Troy, New York
June 7, 2007

/s/ Thomas C. Sacca

ADMINISTRATIVE LAW JUDGE